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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 124

MARGARET M. JOHNSON, MARY E. LAYTON, AND VOYLE CLARK JOHNSON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 39–41) has not yet been reported.

JURISDICTION

The judgment of the circuit court of appeals was entered April 27, 1945 (R. 42), and a petition for rehearing (R. 45–51) was denied May 11, 1945 (R. 53). The petition for a writ of certiorari was filed June 11, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of Feb-

ruary 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the Federal Denture Act of 1942 unlawfully delegates legislative power to licensed dentists and whether it is too vague and ambiguous to satisfy constitutional standards.

2. Whether the laws of Indiana, Michigan, and Wisconsin regulating the practice of dentistry are, in so far as they relate to manufacturers of dentures, an invalid exercise of the states' police power.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 11–14.

STATEMENT

This is another aspect of litigation involving petitioners which was before the Court in *United States* v. *Johnson,* 323 U. S. 273, in which the question of venue under the Federal Denture Act was considered. On May 19, 1944, petitioners were indicted (R. 2–14) in the United States District Court for the Northern District of Illinois in eleven counts charging violations of that statute. Count 1 (R. 2–3) charged, in the language of the statute, that petitioners were engaged in the business of constructing and supplying dentures from casts and impressions sent through the mails and that they used the mails on July

29, 1943, for the purpose of sending a set of dentures, not constructed in accordance with the requirements of the Federal Denture Act, from Illinois to Wisconsin, the laws of which proscribe certain practices, recited in the federal statute, in connection with the construction of dentures. The remaining counts contained similar allegations, each specifying a different use of the mails in sending dentures from Illinois into either Wisconsin, Michigan, or Indiana.

It was stipulated (R. 19–22) between the parties that petitioners are engaged in Chicago, Illinois, in the business of constructing and supplying dentures from casts and impressions sent through the mails; that they used the mails for sending dentures to the persons named in the indictment, who resided in Wisconsin, Michigan, and Indiana; that these dentures were constructed from self-impressions made by the persons to whom the dentures were sent, none of whom were licensed dentists; that none of the impressions were made upon the authorization or prescription of a licensed dentist; and that petitioners used the mails in the manner described with full knowledge of the provisions of the Federal Denture Act.

Petitioners waived a jury trial (R. 18) and were convicted on all counts of the indictment. Each petitioner was sentenced generally to pay a fine of $1,000 (R. 23). Upon appeal to the Circuit Court of Appeals for the Seventh Circuit, the judgments were affirmed (R. 42).

ARGUMENT

The Federal Denture Act (*infra,* pp. 11–12), makes it unlawful for persons who, like petitioners, are engaged in the business of constructing or supplying dentures from casts or impressions sent through the mails or in interstate commerce, to use the mails or the facilities of interstate commerce to send into a state a denture constructed from a cast or impression made by a person other than a dentist licensed by the state, unless the denture is constructed pursuant to the "authorization or prescription" of such a dentist. Broadly stated, the statute denies use of the mail or the facilities of interstate commerce for the shipment of dentures which could not lawfully be constructed in the state into which the denture is sent. For example, Section 63–501 of the Indiana Statutes, 1933, interdicts the practice of dentistry by any unlicensed person. And Section 63–522 defines any person practicing dentistry as including any person who "furnishes, supplies, constructs, reproduces, repairs, or adjusts any prosthetic denture * * * and delivers the same to any person other than the duly licensed dentist upon whose prescription or order the work was performed." It is clear from the stipulated facts, and petitioners do not contend to the contrary, that the practice in which they engaged of constructing dentures by mail order would have been unlawful if practiced in Indiana. It is equally

unlawful when practiced interstate by sending dentures from Illinois to Indiana or to any state having similar regulatory laws.

I

(a) Petitioners contend (Pet. 13–16) that the Federal Denture Act unconstitutionally delegates legislative power to licensed dentists in that it permits them to "authorize" the construction of dentures by persons who otherwise would be unable to do so. It is petitioners' view that, giving "authorization" its broadest meaning, a dentist might, without prescribing a denture or exercising any degree of supervision over its construction, undertake generally to authorize denture manufacturers to construct dentures; that, like a licensing agency, he is empowered to grant authority to denture manufacturers to engage in the production of dentures. We think it clear that the Act has no such meaning. Obviously it does not contemplate a general licensing scheme for the construction of dentures, with the licensing power lodged in licensed dentists. Rather, read in the light of the state statutes which it is designed to implement,[1] the Act, it is plain, contemplates that a licensed dentist may order or prescribe a denture for a patient and that the manufacturer may use the mails or facilities of interstate commerce for the purpose of supplying

[1] See Senate Report No. 1779 and House Report No. 1893, 77th Cong., 2d sess.

such denture, much the same as a physician may prescribe a medicant for a patient and a pharmacist may then supply the medicine. In our view the Act presents no question of delegation of legislative power and petitioner's contention is thus without merit.

(b) We likewise perceive no merit in petitioner's contention (Pet. 16–17) that the Act is so vague, indefinite, and ambiguous as to be unconstitutional. While perhaps not a model of draftsmanship, there is little question that its meaning is clear and that petitioners are not in the least required to speculate as to whether their activities are proscribed by the statute. We submit that the constitutional problem which petitioners find in the statute vanishes upon analysis.

Petitioners suggest (Pet. 17) that the words of the prohibiting clause of the federal statute—"any denture constructed from any cast or impression made by any person other than, or without the authorization or prescription of, a person licensed under the laws of the State or Territory into which such denture is sent or brought to practice dentistry"—"are quite ambiguous, since English construction would necessitate the conclusion that the phrase 'without the authority or prescription of' related to 'impressions'; but it may have been intended, as the Government contends, to relate back to the verb 'constructed.'" As petitioners say, we think the phrase "without the authorization or prescription of," appearing after the dis-

junctive "or," clearly refers to "any denture constructed," but, in any event, the mere fact that there may exist in a statute a question of determining whether a phrase modifies one word or another, furnishes no basis for concluding that the statute is too vague and indefinite to meet constitutional requirements. If it did, there would be many statutes on the books which would be open to the same attack. In any event, the question of construction is not presented by this case, for it is clear that the impressions were not taken by licensed dentists and that neither the dentures nor the impressions were authorized or prescribed by such dentists.

Similarly, the fact that some of the state laws defining the practice of dentistry include the provision that the performance of any of the activities included in the curricula of recognized dental schools or colleges is the practice of dentistry (see *infra*, pp. 13–14), does not present any problem of indefiniteness in this case. In the first place, we think the Court may judicially note the fact that the curricula of recognized dental schools include the subject of the construction of dentures and other appliances to be worn as substitutes for natural teeth. Secondly, the question need not be reached in this case, for the general sentences imposed upon petitioners are supported by any of the counts predicated on shipments into Indiana and Wisconsin, the statutes of which expressly

state that the activities of petitioners constitute the practice of dentistry. *Hirabayashi* v. *United States,* 320 U. S. 81, 85, 105, and cases cited.

II

(a) Petitioners also challenge (Pet. 9–12) the constitutionality of the laws of Michigan, Indiana, and Wisconsin which regulate the practice of dentistry in those states. As we understand their argument, it runs as follows: To construe literally the state laws as prohibiting an individual from taking an impression of his own mouth would render them unconstitutional as an invasion of his right of self-medication. Therefore, to avoid a determination that the statutes are unconstitutional, they must be construed as not prohibiting a person from taking an impression of his own mouth. It follows, they argue, that if a person may take an impression of his own mouth, he may engage another to construct a denture for him from that impression and that the state laws which interdict the construction of such dentures are an invalid exercise of the states' police power.

Assuming, *arguendo,* as the court below did (R. 40–41), petitioners' major premise that an individual may take an impression of his own mouth, it does not follow, as petitioners argue, that he may also engage another layman to perform dental services for him. Indeed, the very purpose of the state laws regulating the practice

of medicine and dentistry is to protect the individual from ignorance, incapacity and imposition on the part of those persons who engage in activities relating to the public health. That the states may do so is not open to question. *Semler* v. *Dental Examiners,* 294 U. S. 608. The situation in this respect is analogous to the inability of a layman to secure harmful drugs for medicinal purpose without prescription of a licensed physician, even though the individual may have diagnosed his own ailment. It follows, as petitioners suggest (Pet. 11), that they will be denied the right to engage in the business of constructing and selling "mail-order" dentures. But since we think it clear that the statutes involved are a reasonable exercise of the protective powers of the state and federal government, petitioners are deprived of no constitutional rights.

(b) Petitioners also urge (Pet. 12–13) in respect of the states' dentistry laws the same argument which they advance against the Federal Denture Act, i. e., that by permitting the construction of dentures only upon the prescription of a dentist, the states have delegated legislative power to licensed dentists without setting out guiding standards for the exercise of that power. Passing the point that delegation of power by a state is not forbidden by the Federal Constitution (*Highland Farms Dairy, Inc.* v. *Agnew,* 300 U. S. 608), and treating the objection as in substance one of due process, we submit that it is unsubstantial.

The states have licensed dentists and have authorized them in their practice of dentistry to procure the construction of dentures. Implicit in the requirement that a denture may be constructed only upon the order or prescription of a dentist is the fact that the dentist will, upon examination of his patient, determine the data necessary to the construction of a denture for that person and that the denture will then be constructed pursuant to the specifications of the dentist. None of the decisions upon which petitioners rely (Pet. 12–13) supports the conclusion that this constitutes an unlawful exercise of legislative power.

CONCLUSION

None of the contentions which petitioners have advanced casts any serious doubt upon the constitutionality of the Federal Denture Act or the state laws which it implements. The propriety of the convictions in all other respects is undisputed. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

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